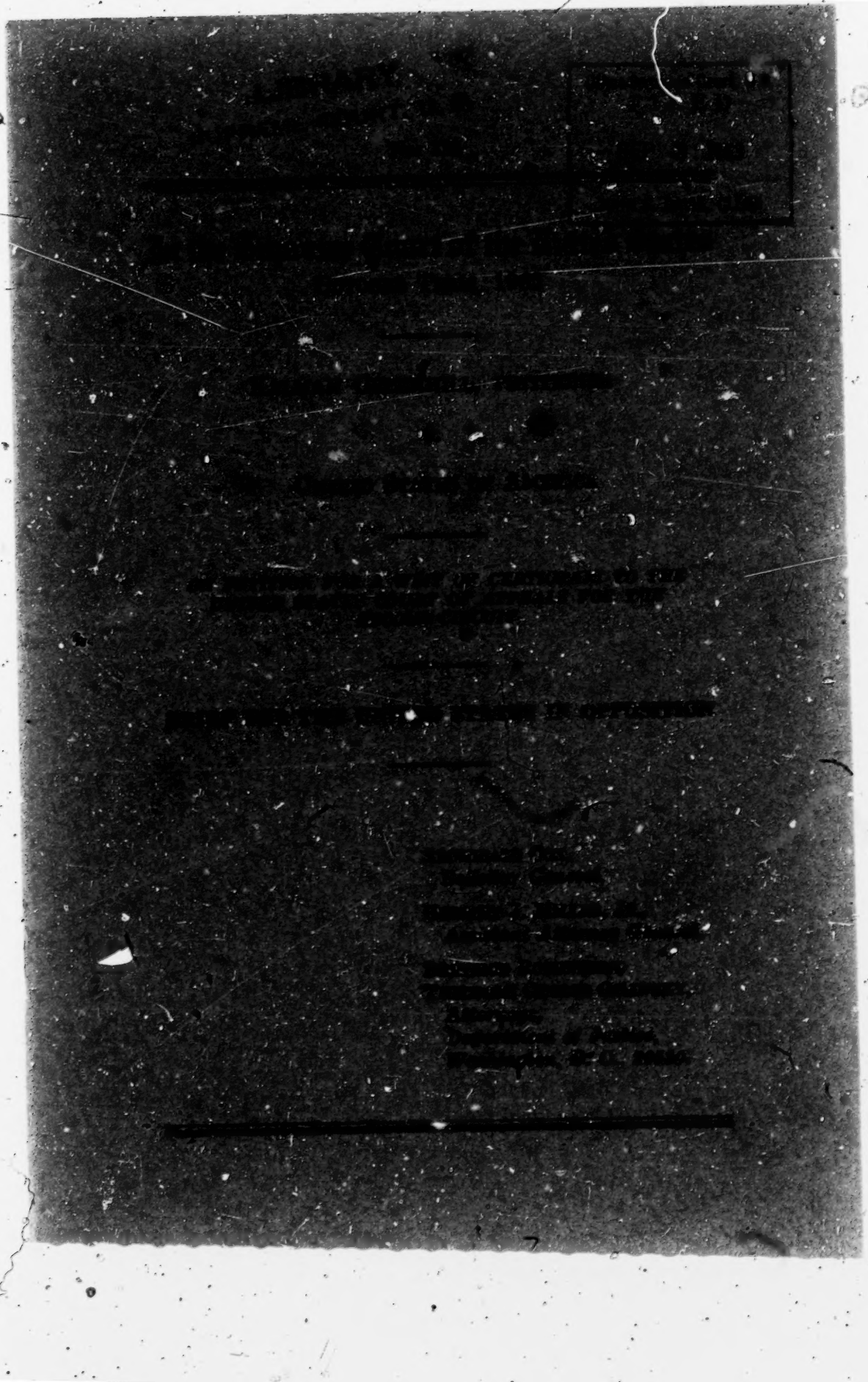

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 338

KALMAN GREENHILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (III. 12; Pet. App. 1) is reported at 317 F.2d 926.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1963 (III. 13). The time for filing a petition for a writ of certiorari was extended to August 5, 1963, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly declined to grant a new trial on the basis of an inadmissible, cumulative report of a deceased accountant, the nonproduction of which had been reviewed on direct appeal.

STATEMENT

Petitioner was convicted by a jury in the Southern District of New York on a charge of transferring property in contemplation of bankruptcy in violation of 18 U.S.C. 152. The conviction was affirmed on direct appeal, 305 F. 2d 289, and certiorari was denied by this Court. 371 U.S. 891.

The facts pertinent to the present motion for a new trial are as follows:

At trial, petitioner's demand for an accountant's report prepared for the trustee in Bankruptcy as "a public record" was denied by the district court (II. 100-101). In its *per curiam* opinion affirming the conviction, the court of appeals said, 305 F. 2d 289:

> The trial judge committed no errors in his rulings on evidence and the appellant's requests that an accountant's report be produced. In any event, appellant was not harmed by his lack of the report in question, since apparently it would not have been admissible as evidence, and

was based on books which were available to the appellant.

After the denial of his petition for a writ of certiorari,[1] petitioner filed a motion for a new trial based upon "newly discovered evidence" (I. 1-60). He alleged that he had obtained a copy of the working papers used to prepare the report of the accountant, who was deceased at the time of trial. The claim was that the report contradicted in various respects the testimony and schedules of the F.B.I. agent who testified for the government at trial. Petitioner asserted that the report showed "substantial assets in the form of accounts receivable and inventory", a fact which, he said, could not have been made known to the jury without the report because "the books showed no items subsequent to November 30th" (I. 8). Finally, he claimed that the report showed an attempt on the part of the accountant "to misstate the contents of the Westco Steel books relating to the North Hollywood plant" (I. 8), and that petitioner "should have been given an opportunity to explain the inaccuracies of this report", and to show that the bankruptcy was due to economic factors beyond petitioner's control (I. 9).

Petitioner also attached the affidavits of two witnesses who had been subpoenaed by the government but had not been used at the trial, and who, he alleged, possessed "exculpatory material" (I. 12).

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[1] The question of the non-production of the report is discussed in the government's brief in opposition to the petition for a writ of certiorari, No. 365, Oct. Term 1962.

The motion was denied by the district court (III. 3). On appeal, the court of appeals affirmed in open court and immediately revoked bail (III. 12).

ARGUMENT

The motion for a new trial was properly denied. The allegedly newly discovered evidence not only fails to cast any doubt on the validity of the verdict, but actually confirms the correctness of the trial ruling that there was no reason to have the report produced.

The report, prepared by an accountant who had died prior to trial, would not have been admissible at the trial because it contained not merely a summary of the documents on which it was based, but conclusions which would require personal explanation. In his motion for a new trial petitioner himself disputed some aspects of the report. Essentially, the report was one man's interpretation of the books and records which were introduced in evidence, books and records which petitioner's accountants were permitted to examine before trial. The government's witness whose analysis is said to be contradicted by the report was available at the trial for cross-examination, while the deceased accountant obviously was not.

The petition alleges that the "prime instance" in which the report differs from the testimony of the government witness is in the handling of an item of $58,200 for the "North Hollywood plant", which the government accountant treated as an asset (Pet. 6). The deceased accountant *also* treated it as an asset (see Balance Sheet I. 29), but added a cav-

The suggestion that the report was more complete than the books of account in evidence which contained no entries after November 30, 1955 (Pet. 4) is refuted by the explicit statement by the deceased accountant that he prepared his Exhibits and Schedules "as [of] November 30, 1955" (see Ex. 8 attached to motion and I. 21).

Petitioner also accuses the government of suppressing the testimony of two witnesses who were subpoenaed by the government, but not presented at trial (Pet. 7). Even assuming the testimony these witnesses would have offered could have materially contributed to the defense, the short answer is that they were readily available to petitioner, as he admits (I. 12). These were persons he knew and with whom he had dealt. There was plainly no suppression of evidence.

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eat noting that, insofar as the amount represented the expenditures for materials or work in progress, rather than equipment, the report should reflect a greater loss (I. 25). Contrary to the position taken in this Court—that the treatment of the $58,200 item was inconsistent with the government's analysis (Pet. 6)—in the district court, petitioner asserted that this very same analysis of the $58,200 item by the deceased accountant was an "apparent distortion of the actual facts" (I. 8-9).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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